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No. 57938-0-I

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

GERALD ROBERT KINGEN and KATHRYN KINGEN,
Husband and Wife,
and the Marital Community Comprised Thereof,

and

SCOTT G. SWITZER and CHERI SWITZER,
Husband and Wife,
and the Marital Community Comprised Thereof,

Petitioners,

vs.

EUFEMIA "EMMA" MORGAN,
NANCY PITCHFORD, and
DANIEL McGILLIVRAY,
Individually and on Behalf of all the
Members of the Class of Persons Similarly Situated,

Respondents.

RESPONSE TO AMICI CURIAE MEMORANDUM OF SEVEN STATEWIDE BUSINESS GROUPS SUPPORTING PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners concur with the position expressed by the seven statewide business organizations ("the amici") which have joined the petitioners in urging this Court to accept review. These organizations, which represent tens of thousands of Washington companies employing over a million Washington workers, stand in a unique position to comment on the practical and legal effects of a judicial decision that, for the first time, would render the officers and agents of an employer the *de facto* guarantors of an employer's unpaid wage obligations. Their view that this decision threatens to have devastating impact upon business in Washington, and that it constitutes a dramatic and unjustified departure from the expressed will of the Legislature, militates strongly in favor of this Court accepting review.

II. ARGUMENT

A. This is a Case of First Impression.

The amici point out that this case is one of first impression. Indeed it is. After a decade of incongruous judicial expansion of the concept of "willfulness" and "intent" for purposes of assessing liability under RCW 49.52.050 and .070, the Court of Appeals has now allowed liability to be imposed even where the nonpayment of wages was the result of an entirely nonvolitional, *legal inability* to pay. This case presents, for the first time, the question whether a defendant can reasonably be found under RCW 49.52.050 and .070 to have acted "willfully" and with the "intent to deprive" employees of wages under such a circumstance.

Accordingly, Petitioners agree with the amici that this case is not just another "financial inability to pay" case governed by the holding set forth in *Schilling v. Radio Holdings*, 136 Wn.2d 152, 961 P.2d 371 (1998). Unlike *Schilling*, where the employer retained control of the company's finances, the defendants in the present case were both practically *and legally* divested of control and authority over the payment of wages by virtue of their company's involuntary Chapter 7 bankruptcy. Thus, the *Schilling* court's concern over the lack of a clearly demarcated standard for testing an employer's proclaimed inability to pay simply does not pertain in the present case.

However, Petitioners would go one step further than the amici in urging not only that this case is distinguishable from *Schilling*, but that it is time for the Court to reconsider its seminal holding in *Schilling*. As that holding has been interpreted by the Court of Appeals, it has all but abandoned the express legislatively prescribed requirement of "willfulness" in favor of a judicially-created rule of absolute liability subject to two arbitrary exceptions. In addition, the Court's failure in *Schilling* to give even a passing nod to the second of the two legislatively-prescribed requisites of liability--namely, the "intent to deprive" employees of wages--has led the lower courts to believe that this critical element of *mens rea* can be entirely disregarded. It is doubtful that this Court ever intended, by its opinion in *Schilling,* to depart so remarkably from the express terms of the statute itself.

B. The No-Fault Liability Imposed by the Court of Appeals' Decision Extends Not only to Employers, But to the Officers and Agents of Employers as Well.

The "issue of concern," as framed by the amici, is whether an *employer* who fails to pay wages as the result of a legal inability to pay can be found to have acted "willfully" and with an "intent to deprive" employees of wages. It would clarify, however, that in the present case Kingen and Switzer were not the "employer." They were officers and managers of the employer. This is significant, because the punitive personal liability for wages provided for by RCW 49.52.070 extends to any "officer, agent, or vice-principal" of an employer. In light of the Court of Appeals' decision in this case, all of those individuals have now have been made the *de facto* guarantors of their companies' wage obligations, and in the event of a corporate bankruptcy may be personally liable for any wages left unpaid.

The point should not be overlooked, however, that to the extent the Court of Appeals' decision purports to hold a bankrupt employer itself liable for unpaid wages which can be discharged in bankruptcy, it does so in direct contravention of federal bankruptcy law. This conflict with federal law highlights once again how the element of bankruptcy puts this case into an entirely different ballpark than *Schilling* and why it presents issues of substantial public importance worthy of review.

C. The Present Case Provides an Ideal Opportunity for the Court to Reevaluate and Clarify the Meaning of its Decision in *Schilling*.

This amici correctly point out that this case provides a suitable context for review of this Court's prior holding in *Schilling*. Here, the *only*

evidence found by the trial court to satisfy the element of "willfulness" was the fact that the defendants made the decision to keep the business up and running while attempting a reorganization under the protection of Chapter 11. By choosing to continue operations in the face of known financial difficulties, the court reasoned, the defendants somehow assumed the risk that down the line, the business would involuntarily end up in liquidation, and that the employees would not be paid. (CP 1577-1662.)

Of course, that this is exactly the situation in which virtually every financially distressed business finds itself when faced with the decision whether to simply close up shop or to attempt to work through its financial difficulties. Therefore, the Court of Appeals' decision stands, in a very real sense, for the proposition that any financially troubled business which does not immediately shut down, and which attempts to rehabilitate itself through a Chapter 11 reorganization or otherwise, does so at the risk of making each and every one of its control people, managers, and administrative employees potentially liable for wages and penalties in the event the effort fails.

D. The Court of Appeals' Decision, if Allowed to Stand, Would Have a Devastating Impact Upon Business in Washington.

Petitioners concur with the view expressed by the amici that the Court of Appeals' decision, if allowed to stand, would have a profoundly chilling effect upon the willingness of individuals and companies to do business in Washington. How many companies, given the choice, will continue to employee workers in Washington once it becomes apparent that the price of doing so is to relinquish the rights afforded by bankruptcy law and to forfeit

the protections conferred by virtue of the corporate form? Similarly, how many CEOs will be willing to stay with the ship and to steer a financially troubled company through a reorganization attempt if the price of failure is to put his personal assets and family at risk?

This case comes before the Court at a particularly significant time, when the looming threat of a global economic recession is causing business operations to contract and workers to be laid off, and when record numbers of businesses and municipalities are finding themselves on the verge of bankruptcy. Considering that the state of Washington is already experiencing an alarming exodus of businesses to more "business friendly" environments (and in view of the fragile state of the economy generally), the Court of Appeals' decision represents a significant roadblock to successful business operation in this state.

For these reasons, Petitioners concur with the amici: the Court of Appeals' decision presents an issue of broad and substantial public importance.

III. CONCLUSION

Based upon the foregoing, Petitioners respectfully urge the Court to accept review.

DATED this 18 day of April, 2008.

W.K. McInerney, WSBA #4809
Attorney for Petitioners

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CERTIFICATE OF SERVICE

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I certify under penalty of perjury under the laws of the State of Washington that on the 18th day of April, 2008, true and correct copies of the following documents were served via hand delivery on the on the person hereinafter named:

1. Response to Amici Curiae Memorandum of Seven Statewide Business Groups Supporting Petition for Review
2. Certificate of Service

to the following persons:

Claudia Kilbreath
Short Cressman & Burgess PLLC
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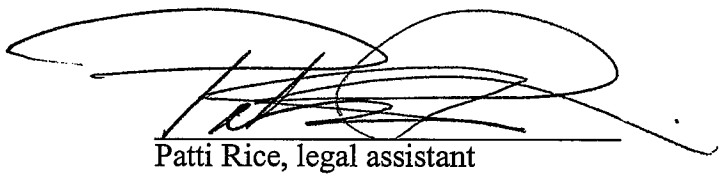
DATED: April 18, 2008



Patti Rice, legal assistant